91-1804

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSE ELIGIO VELEZ and ELBA ZAYAS,
Petitioners,

v.

LYDIA FELIX DE SANTANA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

SHELDON NAHMOD
Counsel of Record
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5261

RAFAEL R. NADAL ARCELAY
PEDRO TORRES AMADOR
CANCIO, NADAL & RIVERA
P.O. Box 364966
San Juan, Puerto Rico 00936
(809) 767-9625

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Are private persons, sued for damages under 42 U.S.C. sec. 1983 for allegedly conspiring with a state official to violate constitutional rights, entitled to assert a qualified immunity defense?

2. Since this Court has granted certiorari and heard oral argument in *Wyatt v. Cole*, No. 91-126, a Fifth Circuit case that raises the same qualified immunity/private person entitlement question as this First Circuit case does, should not certiorari be granted in this case as well?

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OPINIONS IN THIS CASE

The opinions of the district court and the First Circuit Court of Appeals are contained in the Appendix. These opinions are unreported.

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

The First Circuit Court of Appeals rendered its decision against petitioners on February 6, 1992. No petition for rehearing was filed in the First Circuit. Petitioners timely file this petition for writ of certiorari within the ninety (90) days provided by Supreme Court Rule 11. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

STATUTORY PROVISION INVOLVED

The statute whose interpretation is involved in this case is 42 U.S.C. sec. 1983, which reads in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Lydia Felix de Santana, respondent-plaintiff, is the former Treasurer-Administrator of Cooperativa de Ahorro y Credito de la Association de Maestros de Puerto Rico (EDUCOOP), a non-profit voluntary association to which a majority of the Puerto Rico teaching profession belongs. In August, 1989, she sued Jose Eligio Velez, President of the association, and his assistant, Elba Zayas, petitioners-defendants, under 42 U.S.C. sec. 1983 for malicious prosecution and under RICO, 18 U.S.C. sec. 1961 *et seq.* She alleged that in 1986 and 1987 the defendants conspired with Puerto Rico Assistant District Attorney Acevedo Padilla to remove plaintiff from her position as Treasurer-Administrator of the association by bringing baseless criminal charges against her.

This alleged sec. 1983 malicious prosecution conspiracy involved the exercise by the defendants of governmental functions. In the words of the district court:

> The complaint alleges that Assistant District Attorney Acevedo Padilla permitted co-defendant Zayas to

> take control of the investigation against her. Zayas decided which witnesses would be subpoenaed; she was present during the questioning of witnesses and she controlled the questioning; she transcribed the witnesses' interviews; she took stationery from the Commonwealth's Justice Department and prepared documents on that stationery which were later delivered to the Justice Department.

Opinion of the District Court at 3 (App. 14).

According to the plaintiff, the conspiracy resulted in a criminal investigation; the filing against her, by way of indictment, of charges for perjury and threatening a witness; and her arrest and subsequent acquittal. In the course of these events, plaintiff was allegedly removed from her position as Treasurer-Administrator, lost her job at a bank and also was removed from the Board of Directors of the Puerto Rico Energy Authority.

Defendants moved for summary judgment on various grounds. As to the RICO claim, they asserted that the plaintiff did not plead any facts showing a pattern of racketeering activity. As to the sec. 1983 claim, they made various arguments. They contended that plaintiff's sec. 1983 malicious prosecution claim was precluded by prior federal litigation; that it was untimely under the applicable one-year Puerto Rico statute of limitations; that it should be dismissed because of the availability of adequate Puerto Rico remedies; that the conduct alleged did not shock the conscience as required for a substantive due process violation; that plaintiff did not properly allege action under color of law; and *that the defendants were protected by qualified immunity.*

The district court, for the most part following a magistrate's recommendations, granted the defendants' motion as to the RICO claim but allowed plaintiff twenty days

to amend her complaint (which she has since done). More important for present purposes, however, the district court denied defendants' motion as to the sec. 1983 malicious prosecution claim in every respect but one: it dismissed plaintiff's sec. 1983 claim insofar as it was premised on procedural due process because of the availability of an adequate Puerto Rico remedy. Otherwise, it ruled against the defendants on all of their contentions.

This included a determination that as private persons defendants were not entitled to raise the defense of qualified immunity. The district court relied both on the First Circuit's 1978 decision in *Downs v. Sawtelle*, 572 F.2d 1 (1st Cir. 1978) and on the Sixth Circuit's decision in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), for its conclusion that private persons are not protected by qualified immunity.

Defendants timely appealed to the First Circuit the district court's denial of their qualified immunity motion for summary judgment, pursuant to the interlocutory appeal procedure permitted in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Thereafter the First Circuit affirmed the district court. Ruling against defendants, it held that *because the defendants were private persons, they were not entitled to assert a qualified immunity defense.*[1] *Opinion of the First Circuit* at 9-12 (App. 8-11). The First Circuit thus

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[1] Although the First Circuit dismissed the defendants' interlocutory appeal for lack of jurisdiction, its decision to do so was based on the explicit ground that the defendants were *on the merits* not entitled to assert qualified immunity. Thus, according to the First Circuit, defendants could not avail themselves of the interlocutory appeal route of *Mitchell v. Forsyth*, *supra*.

did not reach the merits of their clearly settled law argument regarding sec. 1983 malicious prosecution actions.[2]

The First Circuit explicitly reaffirmed its 1978 decision in *Downs v. Sawtelle*, *supra*, despite its acknowledgement of the contrary general rule in the circuits. At the same time it paid little attention to this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which suggested that private persons ought to be protected by qualified immunity. In addition, the First Circuit did not deal with the pro-qualified immunity policy arguments advanced by defendants. It is from this decision of the First Circuit that they seek certiorari in this Court.

In this regard, the defendants note that shortly before oral argument in the First Circuit in November, 1991, this

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[2] Defendants argued in the First Circuit that they did not violate clearly settled sec. 1983 malicious prosecution law in 1986 and 1987, the time of the alleged unconstitutional conspiracy. It was only on January 8, 1990, in *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404 (1st Cir. 1990) that the First Circuit held for the first time that "filing a baseless charge and nothing more" is not actionable under sec. 1983. Rather, what was required was "malicious conduct . . . so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment." *Id.* at 409. Since this case involves the alleged filing in 1986 and 1987 of baseless charges and nothing more, it is apparent that the defendants could not have violated clearly settled First Circuit sec. 1983 malicious prosecution law. Moreover, there was no other circuit court case law with facts comparable to this one where a sec. 1983 malicious prosecution cause of action was sustained in 1986 and 1987. *See Anderson v. Creighton*, 483 U.S. 635 (1987), mandating a fact-specific qualified immunity test.

Defendapts also asserted that their alleged conduct was not actionable even under the currently applicable *Torres* substantive due process standard for sec. 1983 malicious prosecution claims. *See Siegert v. Gilley*, 111 S.Ct. 1789 (1991). Significantly, this Court has never ruled on the propriety of sec. 1983 malicious prosecution actions. *See Cerbone v. Conway*, 479 U.S. 84 (1986) (per curiam), *dismissing certiorari as improvidently granted.*

Court, on October 7, 1991, granted certiorari in *Wyatt v. Cole*, No. 91-126, a Fifth Circuit case that presents the same qualified immunity/private person entitlement question as this case does.[3] This Court heard oral argument in *Wyatt v. Cole* on January 14, 1992, approximately three weeks before the First Circuit handed down its decision in this case.

As of this writing, *Wyatt v. Cole* has not yet been decided by this Court. Thus, defendants now ask that this Court grant certiorari. In the event this Court holds in *Wyatt v. Cole*, as we submit it should, that private persons sued for damages under sec. 1983 are entitled to raise a qualified immunity defense, the First Circuit's decision should be vacated and remanded. Alternatively, in the event this Court does not reach the qualified immunity/private person entitlement question in *Wyatt v. Cole*, or otherwise disposes of that case in a manner that does not determine the outcome in this case, defendants ask this Court to grant certiorari and permit them to argue this question.

REASONS FOR GRANTING THE WRIT

I.

THIS FIRST CIRCUIT CASE RAISES THE SAME QUALIFIED IMMUNITY/PRIVATE PERSON ENTITLEMENT QUESTION AS *WYATT v. COLE*, NO. 91-126, A FIFTH CIRCUIT CASE NOW PENDING BEFORE THIS COURT.

This Court granted certiorari in *Wyatt v. Cole*, No. 91-126, a Fifth Circuit decision reported at 928 F.2d 718 (5th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3257 (10-7-91). That

[3] *See* 60 U.S.L.W. 3257 (10-7-91). Defendants' counsel notified the First Circuit of this fact at oral argument.

case held that private persons sued for damages under 42 U.S.C. sec. 1983 are entitled to assert qualified immunity. Specifically, the private defendants were sued for invoking a state replevin statute that was later declared unconstitutional. Oral argument was heard on January 14, 1992, and this Court's decision is still pending.

The question presented in *Wyatt v. Cole* was the following: "Do private persons, who conspire with state officials to violate constitutional rights, have available good faith immunity applicable to public officials?" *See* 60 U.S.L.W. 3164.

The present case squarely raises the same question, that is, the entitlement of private persons, sued for damages under sec. 1983 for allegedly conspiring with a state official to violate constitutional rights, to assert qualified immunity. Thus, this Court should grant their petition for certiorari for the same reasons it granted certiorari in *Wyatt v. Cole.*

II.

THERE IS A CONFLICT IN THE CIRCUITS ON THE QUESTION OF WHETHER PRIVATE PERSONS SUED FOR DAMAGES UNDER 42 U.S.C. SEC 1983 ARE ENTITLED TO ASSERT QUALIFIED IMMUNITY; THE FIRST CIRCUIT'S DECISION THAT THEY MAY NOT IS THE MINORITY POSITION.

This case presents an important issue—the qualified immunity/private person entitlement question—whose resolution has split the circuits. Indeed, in the course of reaffirming its 1978 decision in *Downs v. Sawtelle, supra,* the First Circuit noted that a clear majority of other circuits had ruled the other way.[4] Only the Sixth Circuit in

[4] Five of seven circuits that have dealt with this issue have so held. *See Shipley v. First Fed. Sav. & Loan Ass'n of Del.*, 877

(Footnote continued on following page)

Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988),[5] and perhaps the Ninth Circuit,[6] had taken the same position as the First. *Opinion of the First Circuit* at pp. 9-10 (App. 8-9).

Thus, this Court should grant certiorari in order to resolve this conflict and should rule, as argued next, that private defendants are entitled to assert qualified immunity.

III.

THIS COURT'S CASE LAW AND IMPORTANT POLICY CONSIDERATIONS SUPPORT THE POSITION THAT PRIVATE DEFENDANTS SUED FOR DAMAGES UNDER 42 U.S.C. SEC. 1983 SHOULD BE ENTITLED TO ASSERT QUALIFIED IMMUNITY.

The First Circuit's ruling in this case, which relied on its 1978 decision in *Downs v. Sawtelle*, 574 F.2d 1 (1st

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[4] *continued*
F.2d 57 (3d Cir. 1989), *aff'g* 703 F. Supp. 1122 (D. Del. 1988); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982); *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487 (8th Cir. 1987); *Buller v. Beuchler*, 706 F.2d 844 (8th Cir. 1983); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 109 S.Ct. 1105 (1989).

[5] *Duncan* is criticized in III.

[6] Significantly, however, the Ninth Circuit, which first stated broadly and without discussion in a footnote in *Howerton v. Gabica*, 708 F.2d 380, 385 n. 10 (9th Cir. 1983) that "there is no good faith immunity under section 1983 for private parties who act under color of law to deprive an individual of his or her constitutional rights," thereafter appears to have retreated from this position. *See Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n. 8 (9th Cir. 1986), which raised but did not decide the question of whether an independent contract state actor could claim qualified immunity. In reality, therefore, the Sixth Circuit stood alone, post-*Lugar* and before the First Circuit's decision in this case, in holding that private persons are not protected by qualified immunity for their use of unconstitutional state attachment procedures.

Cir. 1978), is inconsistent with this Court's case law as well as with sound sec. 1983 policy considerations.

In *Downs*, a private defendant (who was the plaintiff's sister and spendthrift guardian) was accused of conspiring with government officials to sterilize the plaintiff and to take her child from her. The First Circuit rejected the *Downs* defendant's qualified immunity claim on several grounds. First, it determined that the defendant could not rely derivatively on the qualified immunity of her alleged co-conspirators. Second, applying sec. 1983's "background of tort liability," *see Monroe v. Pape*, 365 U.S. 167, 187 (1961), it asserted that "the Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion [like public officials]." *Downs*, 574 F.2d at 15.[7]

Finally, focusing on its view of sec. 1983 policy, the First Circuit declared:

> To place this court's imprimateur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability of police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with

[7] As noted later, when sec. 1983 was enacted in 1871, the possibility that private persons could be held liable for damages under sec. 1983 was remote at best.

> state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights.

Id. at 15-16.[8]

A. This Court's *Lugar* Decision. The rationale of *Downs* is seriously questionable in light of this Court's ruling in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), that a private person can be held liable under sec. 1983 in circumstances going beyond concerted conspiratorial action with government officials of the kind involved in *Dennis v. Sparks*, 449 U.S. 24 (1980) and *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).[9]

In an influential footnote in *Lugar*, this Court specifically commented on the question of whether private party defendants are entitled to assert qualified immunity in sec. 1983 actions. *Lugar*, 457 U.S. at 942 n. 23. Writing for the majority, Justice White stated that the problems created by holding private persons liable for innocently making use of seemingly valid, yet constitutionally infirm, state laws "should be dealt with not be changing the character of the cause of action but by establishing an affirmative defense." *Id.* He then went on to suggest the possible applicability of the same qualified immunity available to state officials. *Id.* In addition, Justices Powell,

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[8] Judge Coffin dissented on this issue, arguing that "both a sense of fairness and public policy caution against adopting an inflexible rule permitting private parties to be held liable when relevant and perhaps critically important state actors are immune." *Id.* at 16.

[9] *Dennis* held that a private defendant who conspires with an absolutely immune state judge acts under color of law and is not derivatively protected by the judge's absolute immunity. *Adickes* had previously held that a private person acts under color of law and thus may be held liable under sec. 1983 for participating in a conspiracy with a state or local government official to violate a plaintiff's Fourteenth Amendment rights.

Rehnquist and O'Connor, who dissented on the color of law issue, expressly declared that private defendants should be protected by qualified immunity. *Id.* at 956 n. 14. *Lugar* thus broke this Court's silence on which the First Circuit relied in *Downs*.

Downs, and therefore the First Circuit's decision in this case, has also been eroded by developments in the circuits, a clear majority of which, as noted previously, have ruled in favor of qualified immunity for private persons in reliance on *Lugar* and the policy considerations involved in qualified immunity. Indeed, five of seven circuits that have dealt with this issue have so held.[10]

It is true that this circuit court case law for the most part involved sec. 1983 actions for wrongful attachment where private defendants exercised their rights to attach property under a presumably valid state statute. Nevertheless, the policy considerations of fairness and individual autonomy that support qualified immunity for private persons in that setting similarly apply to sec. 1983 *conspiracy claims* against private persons who are accused of acting in concert with government officials.[11]

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[10] *See* note 4, *supra*.

[11] The mere use of the word "conspiracy" in a sec. 1983 case, with its connotations of bad faith and evil motive, should not automatically mean that qualified immunity is inapplicable. After all, sec. 1983 conspiracies, which are a species of joint and several liability, can readily be alleged—as one was here—in order to satisfy sec. 1983's color of law requirement. *See Dennis v. Sparks*, 449 U.S. 24 (1980). Furthermore, it is well settled that the allegation of a sec. 1983 conspiracy, standing alone, is meaningless because there must be a constitutional violation alleged as well. *See, e.g., Villanueva v. McInnis*, 723 F.2d 414 (5th Cir. 1984).

Thus, the qualified immunity inquiry must be made in connection with the constitutional violation alleged, and not the conspiracy *per se*. Where sec. 1983 defendants are charged with a

(Footnote continued on following page)

B. Important Policy Considerations Support Qualified Immunity for Private Defendants. Perhaps the most important policy consideration is that qualified immunity should apply to private party defendants as a matter of *fairness*. Like government officials and employees, they should not have to predict future developments in constitutional law at their peril. Qualified immunity is designed not only to protect governmental functions but to promote fairness—analogous to the notice requirement of procedural due process—to all those who may be held personally liable in damages for their exercise of governmental power. This Court made this fairness point in *Pierson v. Ray*, 386 U.S. 547, 557 (1967) when it stated: "[A] police officer is not charged with predicting the future course of constitutional law."

The Eleventh Circuit explained its conclusion that qualified immunity should be available to private sec. 1983 defendants in a similar way:

> The holding in *Lugar* is premised . . . on the finding that, in certain circumstances, private individuals may be equated with public actors for section 1983 purposes. Since *Lugar* rests on the premise that private and public actors may sometimes be equated, there is little reason to deny to private defendants the type of immunity which has been granted to public defendants.

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[11] *continued*
conspiracy to violate a plaintiff's constitutional rights, they should not be held liable if they did not violate clearly settled law. Just as the existence of sec. 1983 conspiracy allegations directed solely at government officials does not eliminate the appropriateness of a qualified immunity inquiry, so, too, allegations of a sec. 1983 conspiracy directed at private persons should not automatically preclude a qualified immunity inquiry.

Jones v. Preuit & Mauldin, 851 F.2d at 1325. According to the Eleventh Circuit, to equate a private defendant with a government official or employee for sec. 1983 *prima facie* case purposes, yet deny that same individual qualified immunity, would unfairly render the private defendant "more liable" than his public counterpart. *Id.* A private defendant should not have to pay all of the costs of a plaintiff's constitutional deprivation where his or her conduct was objectively reasonable.

A second important policy consideration is that qualified immunity should govern private persons sued under sec. 1983 because it promotes *individual autonomy*[12] and the *public interest* in law enforcement. Denying qualified immunity protection to private persons will discourage them from resorting to the legal system to resolve their grievances and from cooperating with law enforcement officials. Thus, in extending qualified immunity to private persons, the Eleventh Circuit declared:

> [O]ur system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. What we encourage we ought not seek to punish. In the same way that we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert

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[12] *See Comment, Private Party Immunities to Section 1983 Suits*, 57 U. of Chi. L. Rev. 1323, 1325 (1990):

> This Comment proposes completing the state action fiction by according private individuals the full benefits of qualified immunity. Treating private individuals who act jointly with public officers of the state for purposes of liability but not immunity creates a fundamental asymmetry that flouts the notion of private autonomy. Qualified immunity addresses this asymmetry by providing an objective test that shields from liability those private individuals who had no reason to know that their conduct violated established constitutional rights.

> their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional.

Id. at 1325.

And in a law enforcement context, the Seventh Circuit noted that it was not

> unmindful that a policy rationale could be advanced for extending quasi-immunity to persons who bring to the attention of immune prosecuting officials alleged criminal activity which is followed by prosecution. For example . . . a private person who is the victim of a crime or a witness to a crime should not be discouraged from reporting that crime to proper authorities or from following advice of a prosecuting attorney as to whether or not to sign an affidavit against the perpetrator of a crime.

Grow v. Fisher, 523 F.2d 875, 878 (7th Cir. 1975).

Because the petitioners, defendants in this case, were not allowed to raise qualified immunity in connection with their approach to, and cooperation with, the district attorney's office regarding their suspicions of plaintiff's criminal activities, other private persons as a result will be reluctant to come forward and cooperate in the future. In this regard, petitioners emphasize that they are seeking not absolute immunity protection for their alleged conduct but the much more limited objective reasonableness protection of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In light of these developments and policy considerations, *Downs*'s position that the "history" of sec. 1983 justifies the denial of qualified immunity protection for private persons is incorrect. In *Downs*, the First Circuit stated that "[w]hatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in

concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights." *Downs*, 574 F.2d at 15-16.

But *Downs*'s view of the "history" of sec. 1983 is not convincing. To assert that Congress definitively resolved the question of immunity for private party defendants under sec. 1983 is to ignore the fact that Congress in 1871 (when sec. 1983 was enacted) could not have foreseen that private parties would satisfy the state action requirement. In 1871 private parties had no need to claim immunity under sec. 1983 because it was only well into the twentieth century that the Fourteenth Amendment's requirement of state action began to be expansively applied by the Supreme Court to private persons and entities in certain circumstances. *Compare Civil Rights Cases*, 109 U.S. 3 (1883) *with Marsh v. Alabama*, 326 U.S. 501 (1946) (state function), *Lombard v. Louisiana*, 373 U.S. 267 (1963) (government encouragement) *and Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (symbiotic relationship). Moreover, it was not until 1970—almost a hundred years after sec. 1983 was enacted—that this Court held in *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), that a private person conspiring with a government official or employee could be liable under sec. 1983 for action under color of law.[13]

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[13] Indeed, the better 1871 historical analogy is instead to the common law of torts which protects defendants who are negligent from liability to plaintiffs who are contributorily negligent. Both negligence and contributory negligence are generally considered to be objective in nature, focusing on the reasonableness of the challenged conduct in a manner comparable to the objective reasonableness of the qualified immunity test as set out in *Anderson v. Creighton*, 483 U.S. 635 (1987).

C. The Sixth Circuit's Decision in *Duncan v. Peck* Criticized. In ruling in this case that the defendants, as private persons, were not protected by qualified immunity, the district court, and in effect the First Circuit, relied on the Sixth Circuit's decision in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), which rejected qualified immunity protection for private persons who use unconstitutional state attachment procedures. However, *Duncan* is not persuasive.

The Sixth Circuit, distinguishing between qualified immunity and the common law good faith defense to malicious prosecution actions, claimed that all of the circuits that had found qualified immunity applicable to private persons had improperly obscured this distinction. It then went on to find qualified immunity inapplicable in the case before it. Nevertheless the Sixth Circuit, virtually ignoring this Court's discussion of the issue in *Lugar*, concluded that the private defendant who had used the challenged state attachment procedures in the case before it was protected by the common law good faith defense to malicious prosecution.

Unfortunately, by applying a common law defense, the Sixth Circuit confused sec. 1983 malicious prosecution claims—which must be constitutionally grounded—with malicious prosecution claims brought under state tort law. A common law good faith defense to malicious prosecution should, as such, have no place in sec. 1983 malicious prosecution jurisprudence. Sec. 1983 malicious prosecution actions are grounded on due process, not state tort law. *See Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404 (1st Cir. 1990). *See generally* Nahmod, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 sec. 3.15 (3d Ed. 1991).

For all of these reasons, qualified immunity ought to be available to private defendants sued under sec. 1983 for damages.

CONCLUSION

Petitioners respectfully ask that this Court grant certiorari. First, the same qualified immunity/private person entitlement question was presented in *Wyatt v. Cole*, No. 91-126, which is currently pending before this Court. Second, there is a conflict in the circuits on this question, with the First, Sixth and possibly the Ninth Circuit on one side, and the Third, Fifth, Eighth, Tenth and Eleventh Circuits on the other. And third, this Court's decision in *Lugar v. Edmondson Oil Co.* and important policy considerations support a rule permitting defendants sued for damages under sec. 1983 to assert qualified immunity, contrary to the position of the First Circuit in this case.

Respectfully submitted,

SHELDON NAHMOD
Counsel of Record
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5261

RAFAEL R. NADAL ARCELAY
PEDRO TORRES AMADOR
CANCIO, NADAL & RIVERA
P.O. Box 364966
San Juan, Puerto Rico 00936
(809) 767-9625

Attorneys for Petitioners

APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1563

LYDIA FELIX DE SANTANA, ETC.,

Plaintiff, Appellee,

v.

JOSE ELIGIO VELEZ AND ELBA ZAYAS,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Gilberto Gierbolini, *U.S. District Judge*]

Before

Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Skinner,* *District Judge*.

Sheldon Nahmod with whom *Cancio, Nadal & Rivera* was on brief for appellants.

A.J. Amadeo Murga for appellee.

February 6, 1992

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* Of the District of Massachusetts, sitting by designation.

BOWNES, *Senior Circuit Judge.* This appeal stems from a 42 U.S.C. § 1983 malicious prosecution action that plaintiff-appellee, Lydia Felix de Santana, brought against the defendants-appellants, Jose Eligio Velez and Elba Zayas. The appellants appeal the denial of their motion for summary judgment. They make two contentions: 1) that they were entitled to raise the defense of qualified immunity; and 2) that they did not violate § 1983 malicious prosecution law. Because the appellants bring an interlocutory appeal, we must first determine whether we have jurisdiction to entertain their appeal. We hold that we do not.

The question of our jurisdiction requires us to review the district court's ruling that the defendants were not entitled to raise the defense of qualified immunity. We, therefore, follow the customary standard of review applicable to denials of summary judgment. Our review in such cases is plenary. *Cookish v. Powell*, 945 F.2d 441, 443 (1st Cir. 1991). We review the facts and draw all reasonable inferences therefrom in the light most favorable to the nonmovant. *Morales v. Ramirez*, 906 F.2d 784, 785 (1st Cir. 1990). The question before us is whether the district court erred in finding as a matter of law that the defendants did not belong to the class of people entitled to raise the defense of qualified immunity.

BACKGROUND

Felix de Santana is the former Treasurer-Administrator of Cooperativa de Ahorro y Credito de la Association de Maestros de Puerto Rico ("EDUCOOP"), a cooperative organized under Puerto Rico law. Velez serves as the President of EDUCOOP and Zayas is his assistant. Felix de Santana alleges that the defendants conspired with Puerto Rico Assistant District Attorney Acevedo Padilla to remove her from her position at EDUCOOP and to obtain

control of EDUCOOP by bringing baseless criminal charges against her.

On September 16, 1987, Felix de Santana was indicted on charges of perjury and threatening a witness. She was arrested, tried, and subsequently acquitted of the charges.[1] In the course of these events, Felix de Santana was removed from her position as Treasurer-Administrator, lost her job at a bank, and was also removed from her position on the Board of Directors of the Puerto Rico Energy Authority.

In August 1989, Felix de Santana sued Velez and Zayas under 42 U.S.C. § 1983 for malicious prosecution and under 18 U.S.C. § 1961 for violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). She alleged that the prosecutor, Padilla, allowed Zayas to take control of the investigation against her. She contended that Zayas engaged in the following activities: deciding which witnesses would be subpoenaed; being present during the questioning of witnesses and controlling the questioning; transcribing the witnesses' interviews; taking stationery from the Commonwealth's Justice Department and

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[1] Felix de Santana's complaint states,

> Almost two (2) years after being charged, plaintiff Lydia Felix de Santana was acquitted by the court on the basis that there was no evidence *at all* to support that she had committed any crime. Presiding Superior Court Judge Ingrid Rivera de Martinez, in dismissing the indictments, stated, for the record as follows (our translation):
>
> > THE COURT: In this case it has not been proven any of the essential elements of any of the offenses. There does not exist any evidence here. It is not that there is no evidence that shows that a crime has been committed beyond a reasonable doubt. There is *no* evidence of *any* crime.
>
> (Underlying [italics] ours).

preparing documents on that stationery which were later delivered to the Justice Department.

The defendants moved for summary judgment on various grounds. They contended that: 1) Felix de Santana failed to show a pattern of racketeering activity as to the RICO claim; 2) the malicious prosecution claim was precluded by prior federal litigation; 3) the § 1983 claim was barred by the applicable one-year statute of limitations under Puerto Rico law; 4) the § 1983 claim should be dismissed because of the availability of adequate remedies under Puerto Rico law; 5) the alleged conduct did not shock the conscience as required for a substantive due process violation; 6) Felix de Santana failed to properly allege action under color of state law; and 7) the defendants were protected by qualified immunity.

The court granted the defendants' motion for summary judgment as to the RICO claim. It also allowed Felix de Santana twenty days to amend her complaint. The court dismissed the § 1983 claim insofar as it was premised on procedural due process grounds because of the availability of an adequate Puerto Rico remedy. The court denied the motion for summary judgment as to the § 1983 claim on the other grounds. It ruled:

> We find that defendants' conduct as alleged in the complaint coupled with defendants' previous attempt to violate plaintiff's First Amendment rights amounts to a *prima facie* case of conduct so egregious as to "substantively, 'shock the conscience.' " *Morales*, 906 F.2d at 784 (citing *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (6th Cir. 1987)). To cause the arrest of an innocent person and her prosecution when there is no ground for believing she committed a crime is outrageous and under the circumstances as alleged in the complaint, it is actionable under Section 1983. *See Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989)

> ("Whether a criminal defendant is incarcerated is not decisive in determining if he has suffered an abridgment of constitutional rights"); *Hand v. Gary*, 838 F.2d 1420, 1424 (5th Cir. 1988) ("There is a constitutional right to be free of 'bad faith prosecution' "). The complaint alleges that plaintiff suffered financial distress, the loss of her job and reputation and incalculable public humiliation as a result of defendants' actions. We emphasize that this case presents exceptional and unusual circumstances which justify, if barely so, the finding that plaintiff has stated a *prima facie* substantive due process claim. A reasonable juror may conclude at trial that plaintiff's constitutional rights have not been violated.

Opinion and Order, No. 89-1090 GG, at 12-13 (April 29, 1991) (footnote omitted).

JURISDICTION

We first deal with the threshold question of whether we have jurisdiction of an interlocutory appeal raised by private defendants claiming the defense of qualified immunity.

The appellants contend that we have jurisdiction to entertain their interlocutory appeal premised upon Supreme Court precedent in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and this circuit's ruling in *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989). We find no support for appellants' contentions.

The *Mitchell* Court held that "a district court's denial of a claim of qualified immunity, [for a *government* official] to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. The Court's ruling was rooted in the pub-

lic policies served by preventing: 1) the distraction of officials from their *governmental duties*; 2) the inhibition of discretionary action of *governmental employees*; and 3) deterrence from *public service*. *Id.* at 526. The circumstances before us, which involve *private* actors, implicate neither the *Mitchell* holding itself nor the undergirding reasons for the *Mitchell* holding.

The appellants contend that under the functional approach test applied to immunities, this circuit's relevant caselaw permits their interlocutory appeal. This argument is disingenuous. We specifically stated in *Crippa v. Dukakis*, 905 F.2d 553 (1st Cir. 1990), that we had yet to consider whether the functional equivalents of government officials have a right to an interlocutory appeal. *Id.* at 556.

We examined the jurisdictional issue of interlocutory appeals in two cases. The first was in *Lovell*, 878 F.2d 10, where we held that a private party engaged in *private, commercial activity* had no right to an interlocutory appeal of the court's denial of his motion for summary judgment on qualified immunity grounds. *Id.* at 13. We limited our holding in *Lovell* with the qualification that, "[t]his case does not concern a private defendant whose allegedly wrongful conduct arises from acts that were required to be performed under a contract with a governmental body to perform a governmental function." *Id.* at 12 n.4. The circumstances of the case before us do not implicate the *Lovell* qualification because the alleged conduct was not *required* conduct pursuant to a governmental *contract*. Rather, Felix de Santana alleges that the appellants acted *unlawfully* in conspiracy with the Attorney General's Office to drive her out of her position at EDUCOOP for reasons of *self-interest*.

The second case in this circuit bearing on our jurisdiction over interlocutory appeals in qualified immunity cases is *Crippa*, 905 F.2d 553. We found that we lacked jurisdiction because we were unable to ascertain from the record a legal duty on the part of the defendant to perform any governmental function. *Id.* at 557. *Crippa* states:

> Where an appellant has no official (or equivalent) status, *Lovell* 878 F.2d at 12, or where the record does not enable us to determine a cognizable basis for the assertion of appellate jurisdiction, as in the present case, we will not entertain an interlocutory appeal from the denial of an immunity claim on the basis of its label alone.

Id. at 556. As for cases where we would have jurisdiction, *Crippa* states: "Courts of appeals, including our own, determine their jurisdiction to entertain an interlocutory appeal from a denial of a claim of qualified immunity by focusing on the position and function of the party asserting the immunity claim." *Id.* at 555.

Our analysis of the holdings in *Lovell* and *Crippa* show that we confront in this case an issue of first impression. To ascertain whether the appellants have a right to an interlocutory appeal requires that we determine whether they would be entitled to raise the defense of qualified immunity. In so doing, we follow the logic behind the ruling in *Mitchell v. Forsyth*. The policies underlying the defense of qualified immunity are frustrated when a case is erroneously permitted to go to trial. It makes sense then that we need intervene only when we find that the court erred in its denial of summary judgment to defendants entitled to raise the defense. Otherwise, the public policy reasons behind granting an interlocutory appeal are not implicated.

QUALIFIED IMMUNITY

Appellants contend that the district court erred in holding that they were not protected by qualified immunity from Felix de Santana's suit. They argue that the court's holding violates the law of this circuit. The court ruled:

> Defendants have failed to assert a single policy argument to justify the extension of qualified immunity to them. The complaint states that defendants initiated the conspiracy to gain control of EDUCOOP and to accomplish the removal of plaintiff from her position. Neither law nor any public authority required defendants to act as alleged in the complaint. *Rodriguez v. Furtado, supra.* Nor were defendants relying upon some statute or regulation to justify their conduct. . . . Generally, qualified immunity is granted to certain classes of public officials to avoid the disruptive effect that potential damages under Section 1983 may have in the performance of their duties. . . . Extending immunity to defendants here makes no sense; they were not performing any public function or duty. Nor would the threat of liability affect any important public interest; the alleged conduct, prosecuting plaintiff on groundless criminal charges, was solely for an illegal private purpose.

Opinion and Order, at 17-18. We find that the district court correctly followed First Circuit precedent.[2]

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[2] Six circuits, in addition to ours, have ruled on the issue of whether the defense of qualified immunity applies to private defendants. The Fifth, Eighth, Tenth, and Eleventh Circuits have extended qualified immunity to private defendants who either aided public officials pursuant to statutes that were later held to be unconstitutional or acted lawfully pursuant to a governmental contract. *See Jones v. Preuit & Mauldin,* 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds,* 489 U.S. 1002, 109 S. Ct. 1105, 103 L. Ed.2d 170 (1989) (private defendants acting pursuant to state attachment laws entitled to qualified immunity);

(Footnote continued on following page)

In *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), we held that a private defendant involved in a § 1983 conspiracy action was not protected by qualified immunity even though the state actors in the conspiracy were found to have qualified immunity. While subsequent Supreme Court cases have not overruled *Downs*, contrary to appellants' contention,[3] we did give qualified immunity to a private defendant in *Rodrigues v. Furtado*, No. 91-1262 (1st Cir. Dec. 5, 1991).

In *Rodrigues*, we extended qualified immunity to a physician pressed into service by the state to conduct a vaginal cavity search. We extended qualified immunity to the private defendant/physician because we found that he acted

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[2] *continued*

DeVargas v. Mason & Hanger-Silsas Mason Co., 844 F.2d 714 (10th Cir. 1988) (extending qualified immunity to private corporation acting in accordance with duties imposed by contract with governmental body, performing governmental functions, and sued solely on the basis of those acts performed pursuant to contract); *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) (private individual who relies upon unconstitutional state garnishment procedure may assert qualified immunity defense); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982) (private person who relies on a valid state attachment statute later found unconstitutional is entitled to immunity from damages under § 1983).

The Sixth and Ninth Circuits have not extended qualified immunity to private defendants. *See Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (private party in attachment action not entitled to qualified immunity defense); *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983) ("there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights").

[3] Appellants incorrectly state that the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), overruled *Downs*. The majority specifically stated that they were not "reach[ing] the question of the availability of [a qualified immunity] defense to private defendants at this juncture." *Id.* at 942 n.23.

at the command of the state rather than "out of self-interest" and because of the public policy reasons involved in such searches.

> Extending qualified immunity to physicians under the circumstances of this case not only benefits society by effectuating acceptable means to execute body cavity searches pursuant to a warrant issued on probable cause, it also benefits the party being searched by providing a safe means of conducting the search in a medically approved manner. Under the circumstances of this case, exposing private physicians to § 1983 liability without the shield of qualified immunity would be not only unfair, it could deter them from assisting in the execution of valid warrants. A reluctance on the part of physicians to perform body cavity searches could well signal a loss to society of a valuable crime detection procedure or result in these procedures having to be carried out by nonprofessionals, a situation which would be even more intrusive of the subject's privacy.

Id., slip op. at 22-23. The reasons for extending qualified immunity to the private defendant in *Rodrigues* are not implicated by the circumstances of the case before us.

The appellants are alleged to have voluntarily engaged in illegal activities in the advancement of their own self-interests. The public policy reasons behind our extension of qualified immunity in *Rodrigues* does not exist here. We hesitate to extend qualified immunity carte blanche to private defendants in malicious prosecution cases because of the potential abuses and consequences inherent in criminal prosecutions.

Private persons usually are not subject to the same public scrutiny as public officials, which may serve to curtail improper behavior. Individuals wrongfully accused of committing a crime face not only the deprivation of their liber-

ty, but also damage to their reputations as well as loss of property interests. Based on the facts of this case, we see no reason to extend the right to claim qualified immunity to these defendants.

Because we hold that we lack jurisdiction to hear the appellants' interlocutory appeal, we do not review the issue of whether § 1983 malicious prosecution law applies to them.

Appeal dismissed for lack of jurisdiction.

App. 12

[Dated April 29, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 89-1090 GG

LYDIA FELIX DE SANTANA, for herself,
and in representation of the conjugal partnership
which she comprises with Antonio Santana

Plaintiff

v.

JOSE ELIGIO VELEZ, and ELBA ZAYAS

Defendants

OPINION AND ORDER

Plaintiff Lydia Felix de Santana has sued defendants Jose Eligio Velez and Elba Zayas under 42 U.S.C. § 1983,[1] the Racketeer Influenced and Corrupt Organizations Act ("Civil RICO")[2] and Article 1802 of the Puerto Rico Civil Code, alleging that defendants conspired with an Assistant District Attorney of the Commonwealth of Puerto Rico, Francisco Acevedo Padilla, to maliciously prosecute her. On November 8, 1989, defendants moved for summary judgment and the case was referred to Magistrate J. Arenas.

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[1] Section 1983 imposes liability on any person who, acting under color of state law, deprives another of rights protected by the Constitution or federal statutes. 42 U.S.C. § 1983.

[2] 18 U.S.C. § 1961 *et seq.* (1989).

The Magistrate recommended that defendants' motion for summary judgment should be granted as to the Civil RICO claim but denied as to the malicious prosecution and the pendent state law claims. Plaintiff and defendants filed timely objections to the Magistrate's Report and Recommendation.[3]

I. BACKGROUND

Plaintiff is the former Treasurer-Administrator of the Cooperativa de Ahorro y Credito de la Asociacion de Maestros de Puerto Rico ("EDUCOOP"), a cooperative organized under the terms of Law No. 291 of April 9, 1946 and Law No. 1 of June 15, 1973. Co-defendant Jose Eligio Velez is the President of the Asociacion Puertorriquena de Maestros ("Asociacion de Maestros") and co-defendant Elba Zayas is Velez's assistant. Asociacion de Maestros de Puerto Rico is a non-profit voluntary association to which a large majority of the teaching profession of Puerto Rico belongs.

The complaint essentially alleges that Velez, aided and abetted by Zayas, sought to oust plaintiff from her position as Treasurer-Administrator of EDUCOOP and to obtain control of EDUCOOP by conspiring with Assistant District Attorney Acevedo Padilla to bring baseless criminal charges against plaintiff. Sometime in 1986, Assistant District Attorney Acevedo Padilla launched a criminal investigation into the affairs of EDUCOOP, which culminated in the filing of formal charges against plaintiff. On

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[3] Pursuant to Rule 311.10 of the Local Rules, defendants have requested oral argument. Because we find that oral argument is not required to resolve the issues before the court, we deny defendants' request.

September 16, 1987, plaintiff was indicted for perjury and for threatening a witness in violation of 33 L.P.R.A. § 4421 and § 4435A. She was arrested, fingerprinted and forced to post bail in order to avoid immediate incarceration. As a result of her indictment, plaintiff was terminated from her employment at a bank and removed from the Board of Directors of the Puerto Rico Energy Authority.

The complaint alleges that Assistant District Attorney Acevedo Padilla permitted co-defendant Zayas to take control of the investigation against her. Zayas decided which witnesses would be subpoenaed; she was present during the questioning of witnesses and she controlled the questioning; she transcribed the witnesses' interviews; she took stationary from the Commonwealth's Justice Department and prepared documents on that stationary which were later delivered to the Justice Department.

Almost two years after being indicted and criminally prosecuted, plaintiff was acquitted of all charges against her. She brought suit against defendants.[4]

II. SUMMARY JUDGMENT

In determining whether summary judgment is appropriate, the court must view the record in the light most favorable to the party opposing the motion, and indulge all inferences favorable to that party. *Celotex Corp. v.*

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[4] We agree with the Magistrate's finding that there is no "plausible reason why defendants' brief should total in excess of one hundred and seventy-five pages." Report and Recommendation at 3. In excessively long briefs, arguments get lost in a maze of facts and legal holdings and more importantly, limited judicial resources are wasted attempting to discern what is defendants' version of the facts and how the law supports it.

Catrett, 477 U.S. 317, 324-25 (1986); *Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 633-34 (1st Cir. 1990); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), *cert. denied*, 59 U.S.L.W. 3462 (1991). Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Brennan v. Hendrigan*, 888 F.2d 189, 191 (1st Cir. 1989).

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) establishes that the party moving for summary judgment has the initial burden of showing "the absence of a genuine issue concerning any material fact." *Id.* at 159. If the movant (in this case defendants) shows that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-movant to establish the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324.[5] The materiality of a fact is determined according to the substantive law that governs the dispute. A fact is material only if it affects the outcome of the suit. *Anderson*, 477 U.S. at 248. A material fact creates a genuine issue for trial "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248.

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[5] *See generally* Louisell, Hazard & Tait, *Cases and Materials on Pleading and Procedure; State and Federal* 170 (6th ed. 1989) ("[A]s the Court stated in *Celotex*, the nonmoving party does not necessarily have to produce evidence in a form that would be admissible at trial. And, as the *Adickes* Court said, the nonmoving party does not have to adduce evidence at all until the moving party satisfies its initial burden of showing the absence of a genuine issue of fact").

In deciding defendants' motion for summary judgment, we examine the facts in the light most favorable to the non-moving party, in this case, plaintiff. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986); *Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 633-34 (1st Cir. 1990); *Roy v. Augusta*, 712 F.2d 1517 (1st Cir. 1983). Applying this standard, and after an extensive review of the record, and according the non-moving party the indulgence required, we find that plaintiff has presented specific facts showing a genuine issue for trial. *Medina Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990).

III. DISCUSSION

Defendants invoke the following grounds in support of their motion for summary judgment: *res judicata*; availability of adequate state remedies; failure of defendants to act under color of law; qualified immunity; and the expiration of the statute of limitations.

A. RES JUDICATA

The doctrine of *res judicata* precludes relitigation of a matter adjudged or that could have been raised for determination in a previous suit. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *See also* Hazard & James, *Civil Procedure* § 11.6, at 594 (1985) ("The basic concept of the rules of *res judicata* is that a person who has once had an opportunity to litigate a matter may justly be denied an opportunity to litigate it on another occasion").

Defendants contend that plaintiff's claim of malicious prosecution was raised or could have been raised in a previous federal suit, namely, *EDUCOOP v. Gonzalez Padro*,

Civil No. 86-0751 (HL). We disagree. In Civil Action No. 86-0751, plaintiffs EDUCOOP, Judith Rodriguez, President of EDUCOOP and Lydia Felix, Treasurer-Administrator of EDUCOOP, sought a temporary restraining order (TRO) and damages under section 1983 against defendants, Luz Delia Gonzalez Padro, the Cooperative Inspector, and Asociacion de Maestros de Puerto Rico, its President, Jose Velez and his assistant Aida Diaz Rivera. Plaintiffs alleged that their First Amendment rights were violated when defendants issued an order prohibiting plaintiffs from publishing in any manner the report of a Hearing Officer finding co-plaintiff Lydia Felix innocent of all charges filed against her by defendant, Aida Diaz Rivera. The court granted the TRO finding that defendants' action constituted a "prior restraint on plaintiffs' freedom of speech in violation of the First Amendment." (Opinion and Order, Civil No. 86-0751 at 2). With respect to plaintiffs' request for damages for the First Amendment violation, the court held that there was no need to compensate plaintiff with damages because the TRO fully remedied the burden on plaintiffs' First Amendment rights. Noting that plaintiffs' second amended complaint sought damages under Section 1983 on two grounds—an attack on plaintiff Felix's reputation and defendants' failure to comply with internal regulations or state law—the court held that plaintiffs failed to state a Section 1983 claim because

> an attack on reputation alone does not constitute a Constitutional violation, *see Paul v. Davis*, 424 U.S. 693 (1976); nor do allegations of failure to comply with internal regulations or state law establish a claim to a Constitutional violation under the facts of this case, *see Snowden v. Hughes*, 321 U.S. 1 (1944).

(Opinion and Order, *supra*, at 4).

The above description of Civil Action No. 86-0751 shows that the issues decided in that case and the issues in the instant action are different and based on a separate and distinct set of facts. The court's decision in Civil No. 86-0751 does not collaterally estop plaintiff from presenting a Section 1983 malicious prosecution claim because plaintiff was not indicted as part of the alleged malicious prosecution claim until September 16, 1987, nearly eight months after the dismissal and subsequent closing of Civil Action No. 86-0751. Defendants' *res judicata* argument ignores the requirement that a plaintiff asserting a federal claim for malicious prosecution must first prove an essential element of common law malicious prosecution, namely, the institution of criminal proceedings against an innocent person without probable cause and solely for an illegal purpose. *See Torres v. Superintendent of Police,* 893 F.2d 404 (1st Cir. 1990). *See* Report and Recommendation, *supra,* at 10 ("[S]imply stated the malicious prosecution claim could not have been brought on May 14, 1986 when the prior action was filed because plaintiff had not even been indicted, let alone acquitted").

B. AVAILABILITY OF ADEQUATE STATE REMEDY

1. *Procedural Due Process*

Defendants contend that even if the court assumes that plaintiff's malicious prosecution claim is true, the existence of an adequate state remedy defeats plaintiff's federal malicious prosecution claim under section 1983. It is settled that "[w]here state law affords an adequate remedy, plaintiffs may not also have a procedural due process claim for malicious prosecution under section 1983." *Torres,* 893 F.2d at 411 (citing *Barnier v. Szentmi Klosi,* 810 F.2d 594 (6th Cir. 1987).

In a thoughtful supplemental Report and Recommendation filed on January 2, 1991, Magistrate Arenas found that plaintiff had an adequate and available remedy under 31 L.P.R.A. § 5141 and therefore, plaintiff has no procedural due process claim under section 1983. Plaintiff has not objected to this portion of the Report and Recommendation, and we find it persuasive. *Cf.* Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L.Rev. 979, 981 (1986) ("with the exception of police brutality cases, [*Parratt v. Taylor*, 451 U.S. 527 (1981)] excludes from the federal courts all low-level intentional official misconduct resulting in losses of property or nonfundamental liberties where state law provides a remedy"). Therefore, we will not review that portion of the Report and Recommendation *de novo*. *See Thomas v. Arn*, 474 U.S. 140 (1985).

2. *Substantive Due Process*

The more difficult issue is whether defendants' conduct is so egregious as to constitute "conscience-shocking" conduct in violation of substantive due process and actionable under section 1983. Not every common law tort constitutes a constitutional violation actionable under Section 1983.

In *Pittsley, et al. v. Warish*, No. 90-1372, slip op. (1st Cir. Feb. 27, 1991), the First Circuit reviewed the substantive component of the due process clause:

> The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first theory, it is not required that the plaintiffs prove a violation of a specific liberty or property interest; however, the state's conduct must be such that it "shocks the conscience." *See Rochin* [v. *California*], 342 U.S. at 172, 173. To succeed under

the second theory, a plaintiff must demonstrate a violation of an identified liberty or property interest protected by the due process clause. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (state must provide medical care to persons with serious medical needs while in state custody); *Youngberg v. Romeo*, 457 U.S. 307, 315, 319 (1982) (corporal punishment of a student inflicted by a public school teacher violates substantive due process); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (individual committed to a state institution has a protected liberty interest in receiving reasonably safe living conditions and freedom from unreasonable bodily restraints); *Landrigan v. Warwick*, 628 F.2d 736, 741-42 (1st Cir. 1980) (substantive due process implicated where a policeman uses excessive force in the apprehension of a suspect).

Since plaintiff has failed to allege or demonstrate a violation of an identified interest protected by the due process clause, we examine the facts as alleged in the complaint in the light most favorable to plaintiff to analyze whether the defendant's conduct here "shocks the conscience." The complaint asserts *inter alia*, that defendants conspired with Assistant District Attorney Acevedo Padilla to have plaintiff prosecuted for false criminal charges in an attempt to remove plaintiff from her position at EDUCOOP. As a result of the conspiracy, plaintiff was terminated from her job at a bank and from the Board of Directors of the Puerto Rico Energy Authority.[6]

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[6] We reject defendant's attempt to assert a causation defense. To illustrate, defendants argue that plaintiff alleges that "as a result of the indictment—not as a result of any further action by defendants—plaintiff was terminated from her job and from her position as a member of the Board of the Puerto Rico Energy

(Footnote continued on following page)

In support of their theory that the actions alleged in the complaint do not rise to a substantive due process violation, defendants cite *Morales v. Ramirez*, 906 F.2d 784 (1st Cir. 1990) and *Johnson v. Barker*, 799 F.2d 1396 (9th Cir. 1986). Both cases are distinguishable from the instant case.

In *Morales*, a former employee of the United States Department of Labor sued several federal officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) alleging a violation of her due process rights when defendants maliciously induced her prosecution on false criminal charges. The plaintiff in *Morales* admitted that she had committed irregularities, including forging the signature of an employee on an interview statement. The First Circuit found little evidence in support of the federal malicious prosecution claim:

> Giving [plaintiff] the benefit of the doubt, she has shown that the material proffered was incomplete and compiled with a view toward placing her in a poor light; that defendants drew (and encouraged other to draw) erroneous inferences from it; that defendants' motives were impure; and that defendants improvidently involved the United States.

906 F.2d at 789.

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[6] *continued*

Authority." (Defendants' Objection to the Magistrate's Report and Recommendation, at 5). But plaintiff alleged that she was indicted as a result of the malicious conduct of defendants. Defendants' alleged malicious acts were the proximate cause of plaintiff's damage. To suggest a contrary interpretation, borders on the verge of absurdity.

Similarly, the allegations in *Johnson v. Barker*, 799 F.2d 1396 (9th Cir. 1986) were insufficient to state a conspiracy for malicious prosecution. The Ninth Circuit found that

> [t]he record here does not show that [plaintiffs] were unconstitutionally deprived of liberty or by the distortion and corruption of the processes of law. Nothing in the record indicates any corruption of witnesses or falsification of evidence. Indeed, there is no indication whatsoever that the defendants intended or attempted to deny [plaintiffs] a fair trial.

799 F.2d at 1400.

We find that defendants' conduct as alleged in the complaint coupled with defendants' previous attempt to violate plaintiff's First Amendment rights[7] amounts to a *prima facie* case of conduct so egregious as to "substantively, 'shock the conscience'." *Morales*, 906 F.2d at 784 (citing *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (6th Cir. 1987)). To cause the arrest of an innocent person and her prosecution when there is no ground for believing she committed a crime is outrageous and under the circumstances as alleged in the complaint, it is actionable under Section 1983. *See Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) ("Whether a criminal defendant is incarcerated is not decisive in determining if he has suffered an abridgment of constitutional rights"); *Hand v. Gary*, 838 F.2d 1420, 1424 (5th Cir. 1988) ("There is a constitutional right to be free of 'bad faith prosecution' "). The complaint alleges that plaintiff suffered financial distress, the loss of her job and reputation and incalculable public humiliation

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[7] We take judicial notice of the previous lawsuit between the parties, *EDUCOOP v. Gonzalez Padro*, Civil No. 86-0751, where the court issued a temporary restraining order to prevent defendants from violating plaintiff's First Amendment rights.

as a result of defendants' actions. We emphasize that this case presents exceptional and unusual circumstances which justify, if barely so, the finding that plaintiff has stated a *prima facie* substantive due process claim. A reasonable juror may conclude at trial that plaintiff's constitutional rights have not been violated.

Defendant relies on language in *Torres v. Superintendent of Police*, 893 F.2d 404 (1st Cir. 1990), to argue that the allegations in plaintiff's complaint do not rise to a deprivation of constitutional dimensions. We disagree. In *Torres*, the First Circuit noted that courts have been reluctant to find conscience shocking conduct "[w]here plaintiff has not been physically abused, detained, prosecuted due to racial or political motivation or otherwise deprived of equal protection of the law . . ." 893 F.2d at 410. The conduct in question must be so egregious as to shock the conscience, but this standard is not limited to inhuman deprivation of liberty or physical abuse. Otherwise, substantive due process violations for malicious prosecution under Section 1983 would resemble more torture than misuse of legal process that subjects a person to a deprivation of constitutional magnitude.

Our analysis is supported by more recent First Circuit precedent, which recognizes that the determination of whether conduct "shocks the conscience" is made on a case-by-case basis. *See Pittsley, et al. v. Warish, et al., supra*, at 9 n.3 (verbal threats or harassment may rise to the level of a substantive due process violation); *Morales v. Ramirez*, 906 F.2d 784 (1st Cir. 1990) ("[T]here may conceivably be cases in which the withholding of information, or its arrangement in a misleading pattern, becomes so egregious as to work a deprivation of constitutional dimension").

We emphasize that plaintiff has merely demonstrated sufficient facts to create a genuine dispute precluding summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986). Whether defendants' conduct constitutes malicious prosecution is an issue for the jury, not the court.

C. COLOR OF LAW UNDER SECTION 1983

In *Dennis v. Sparks*, 449 U.S. 24 (1980), the Supreme Court held that

> to act 'under color' of state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.

449 U.S. at 27-28 (citations omitted).

In the instant case, plaintiffs have pled sufficient facts to create a genuine factual controversy on whether defendants conspired with Assistant District Attorney Padilla and whether such conspiracy resulted in the malicious prosecution of plaintiff. The complaint states, *inter alia*, that Assistant District Attorney Acevedo Padilla permitted co-defendant Zayas to take control of the investigation, including deciding which witnesses would be subpoenaed and what question would be asked (Complaint ¶ 8) and that she was present during the questioning of witnesses and typed the witnesses statements herself. In short, these allegations (and other in the complaint not mentioned herein) are sufficient for this court to find that plaintiff has properly pled the conspiracy claim. We are not persuaded by defendants' other arguments.

D. QUALIFIED IMMUNITY

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court left open the question of the availability of a qualified immunity defense under section 1983 to private individuals. 457 U.S. at 942 n. 23.

The policy argument for granting qualified immunity to private person is primarily based on a desire to protect innocent persons who have abided by a law that was subsequently invalidated. *See* Robbins, *The Legal Dimension of Private Incarceration*, 38 Am. J.L. Rev. 531, 655, n. 609 (1989) (citing cases and concluding: "Because of the courts' heavy reliance on a policy argument grounded in a desire to protect innocent, law-abiding persons from subsequent judicial determinations, it is unclear whether private persons in different circumstances will also be granted use of qualified immunity defense").

We find no valid reason to extend qualified immunity to private persons under the circumstances as alleged in the complaint. The analysis of the Sixth Circuit in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) on this point is persuasive. After examining holdings in other circuit courts extending good faith immunity to private parties, the Sixth Circuit declined to adopt the good faith immunity defense on two grounds:

> [T]he courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense. Good faith immunity is designed to protect defendants from the difficulties of defending a suit by dismissing the case before the parties have engaged in costly and time consuming discovery. Since it is based on an objective standard, the issue can often be decided on the pleadings. A good faith defense, on the other hand, is likely to be based in large part on the facts

> of the case, with the suit only being dismissed after trial, or on summary judgment if the defendant can show that there is no material dispute as to the facts. In short, good faith immunity is based on an objective analysis, while a good faith defense includes subjective factors. While the Fifth, Eighth and Eleventh Circuits have correctly set forth the historical and policy reason for a good faith defense, we find no justification for the subtle, yet significant transformation of this defense into an immunity.
>
> We also believe that adopting a good faith immunity in this case would require courts to either abandon the Supreme Court's use of an objective test to determine immunity, or to substantially change the nature of the torts of malicious prosecution and wrongful attachment, which rely on subjective elements.

844 F.2d at 1266 (footnotes omitted).

Even cases that have extended good faith immunity to private parties support our conclusion that immunity is inappropriate under the circumstances of this case. In *Rodiguez v. Furtado, et al.*, Civil No. 87-1619 (D. Mass., Feb. 11, 1991) (1991 U.S. Dist. LEXIS 2164), the court extended qualified immunity to a private physician who conducted a vaginal search of plaintiff. Judge Wolf reasoned that since the physician acted under color of law to perform the search and seizure—traditionally a function within the exclusive police power of the state—he should be entitled to "no less protection" than that available to police officers.[8]

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[8] Under *Malley v. Briggs*, 475 U.S. 335 (1986) a police officer is entitled to qualified immunity when he obtains a warrant that results in an unconstitutional arrest.

The policy justifications for supporting the extension of qualified immunity to a physician are persuasive. As Judge Wolf found:

> The private doctor confronted with a warrant authorizing a body cavity search is not in a similar position to a private party who employs an unconstitutional statute in its own favor . . . or otherwise conspires with public officials to accomplish private goals . . . Rather, the doctor is subject to strong official persuasion, if not a binding legal obligation, to perform the authorized search. (citations omitted).

Defendants have failed to assert a single policy argument to justify the extension of qualified immunity to them. The complaint states that defendants initiated the conspiracy to gain control of EDUCOOP and to accomplish the removal of plaintiff from her position. Neither law nor any public authority required defendants to act as alleged in the complaint. *Rodriguez v. Furtado, supra.* Nor were defendants relying upon some statute or regulation to justify their conduct. *See, e.g., Folson Ins. Co. v. Moore,* 681 F.2d 1032 (5th Cir. 1982) (private person who relies on a valid state attachment statute later found unconstitutional is entitled to immunity from damages under Section 1983). Generally, qualified immunity is granted to certain classes of public officials to avoid the disruptive effect that potential damages under Section 1983 may have in the performance of their duties. For example, prosecutors are generally immune from civil liability under Section 1983 for initiating and pursuing a criminal prosecution. *Imbler v. Pachtman,* 424 U.S. 409 (1976). Otherwise, the possibility of personal liability would have a chilling effect in the prosecutor's ability to exercise his public duties. *See* 424 U.S. at 421-29. Extending immunity to defendants here makes no sense; they were not performing any public function or duty. Nor would the threat of lia-

bility affect any important public interest; the alleged conduct, prosecuting plaintiff on groundless criminal charges, was solely for an illegal private purpose.

In short, to permit defendants to avail themselves of the qualified immunity veil under the circumstances of this case would "eviscerate the fragile protection of individual liberties afforded by [section 1983]." *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978).[9]

E. STATUTE OF LIMITATIONS

It is well established that to state a malicious prosecution claim the accused must be exonerated of all charges. Defendants contend that plaintiff's claim under section 1983 is barred by the applicable statute of limitations, that is, Puerto Rico's one-year statute, 31 L.P.R.A. § 5298(2), because plaintiff had knowledge of, or reason to know of, the existence of a malicious prosecution claim. Defendants' contentions are mistaken. The one-year statute of limitations accrues for a malicious prosecution claim only after an accused has been exonerated of all the charges against her. *See, e.g., Robinson v. Maruffi*, 895 F.2d 649, 655 (10th Cir. 1990); *Rohena Encarnacion v. Dept. of Treasury*, 665 F. Supp. 102, 103 (D.P.R. 1987). If an accused can only

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[9] Defendants contend that the Magistrate erred in holding alternatively, that defendants are not entitled to qualified immunity because they knew or must have known that their actions violated clearly settled law. According to defendants, the tort of malicious prosecution under section 1983 was only established by *Torres v. Superintendent of Police of Puerto Rico*, decided in January, 1990. Defendants' contention is erroneous. *See e.g., Malachowski v. City of Keene*, 787 F.2d 704, 713 (1st Cir. 1986) ("It is well-settled that a § 1983 claim for . . . malicious prosecution cannot be stated without an allegation that the prosecution terminated in a manner favorable to the accused" (citations omitted)).

bring a malicious prosecution claim after exoneration of all charges the court fails to see how her claim for malicious prosecution accrues when she has knowledge, or reason to know of the injury. *See Rose v. Bartle*, 871 F.2d 331, 348-50 (3rd Cir. 1989). In fact, the practical effect of defendants' contention is to make it easier for an accused to sue persons in defendants' position since a crucial element of malicious prosecution, exoneration of all charges, would be eliminated.

Ultimately, defendants' arguments rest on *Edwards v. Sotomayor*, 557 F. Supp. 209, 217 (D.P.R. 1983). In *Edwards*, the court held that a federal malicious prosecution claim accrues when plaintiffs knew or had reason to know of the injury. We disagree with the district court's analysis in *Edwards*. If a malicious prosecution claim accrues when the plaintiff knew or had reason to know of the underlying injury, the plaintiff must first be exonerated of all charges for the injury to be conclusively established. This element, borrowed from common law malicious prosecution, prevents the filing of unmeritorious malicious prosecution claims. In other words, *Edwards* creates a rule which allows anyone accused of criminal charges to sue in federal court under a malicious prosecution claim, whether she is found innocent of the crime charged or not. Not only does the *Edwards* accrual analysis run contrary to important federalism principles, but it invites the filing of an avalanche of Section 1983 cases in federal court.

IV. RICO CLAIM

Plaintiff claims that defendants are liable under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") for maliciously prosecuting her. The RICO statute provides that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(c).

Plaintiff alleges that the enterprise is the Asociacion de Maestros and it was conducted, within the meaning of RICO, by defendants. *See, e.g., Arzuaga-Collazo v. Oriental Federal Sav. Bank*, 913 F.2d 5, 6 (1st Cir. 1990) ("the word person as used in RICO] to describe one who conducts an enterprise, does not apply to the enterprise itself"). Magistrate Arenas rejected plaintiff's RICO claim. We agree.

Plaintiff has pled no facts to show that the defendants engaged in a pattern of racketeering activity; plaintiff seems to equate the word racketeering with fraud. *Arzuaga-Collazo*, 913 F.2d at 4. And, as the Magistrate found, plaintiff has violated the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. In short, plaintiff's RICO claim is unsuccessfully pleaded. *See, e.g., New England Data Servs. v. Becher*, 829 F.2d 286, 291 (1st Cir. 1987).

Plaintiff argues that she should be allowed to amend her complaint regarding the RICO claim. Leave to amend the pleadings under Rule 15(a) of the Federal Rules of Civil Procedure is within the discretion of the court and should be granted freely. In *Becher*, the First Circuit held that a Rule 9(b) violation in a civil RICO case should not automatically require dismissal of the complaint.

Based on *Becher* we will allow plaintiff to amend the complaint within the next twenty (20) days. No extensions of time shall be granted regarding this matter.

V. CONCLUSION

Plaintiff is GRANTED twenty (20) days to amend the complaint. Defendants' motion for summary judgment is hereby HELD IN ABEYANCE as to the RICO claim but DENIED as to the malicious prosecution claim and the pendent state law claims.

SO ORDERED.

San Juan, Puerto Rico, this 29th day of April, 1991.

/s/ GILBERTO GIERBOLINI
GILBERTO GIERBOLINI
U.S. District Judge